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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1678

MITZI S. BRIGGS,
Appellant,

VS.

STATE OF CALIFORNIA, etc.,
Appellee.

Appeal from the Court of Appeal of California
First Appellate District, Division Two

RESPONSE TO MOTION TO DISMISS OR AFFIRM

JESS S. JACKSON
180 Park Road
Burlingame, California 94010

GIDEON KANNER
1440 West Ninth Street
Los Angeles, California 90015
Attorneys for Appellant

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

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INTRODUCTION

Appellant has presented her case to this Court on the basis of a pervasive, nationwide constitutional problem, whereby the law on what constitutes a *de facto* Fifth Amendment taking effected by oppressive governmental precondemnation activities, is in a state of total intellectual disarray and at best varies from state to state in a haphazard fashion (see Jurisdictional Statement, pp. 21-31). Appellee's response is to ignore entirely the important

constitutional issue thus presented,[1] and to dwell instead on various minutiae of this single case, premised on the tacit notion that as long as a state court decides (or ignores) an issue, that somehow constitutes an "independent non-federal ground" (Motion to Dismiss, p. 11) even though the State court decision is grossly at variance with federal constitutional law laid down by this Court.[2]

It seems to Appellant that Appellee's argument in this regard was fully answered by Mr. Justice Stewart's concurrence in *Hughes v. Washington*, 389 U.S. 290, 298 (1967): ". . . The Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*." Here, the State *by the effect of its deeds* took Appellant's property; by undisputed trial court findings[3], the State *completely* stripped Mrs. Briggs of *all* her significant

[1]Please note that Appellee does not quarrel with the importance or incidence of the constitutional issue. Nor does Appellee dispute in the slightest the State and federal law survey presented by Appellant. Appellee simply disclaims the entire topic.

[2]In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124-128, this Court outlined factors of special significance whose presence is determinative of a taking. They include: (a) the economic impact on the owner, (b) the owner's reasonable expectations, (c) a state tribunal's *reasonable* conclusion that police power objectives would be promoted by prohibiting a particular contemplated use of land (not as here, a preclusion of all uses to facilitate a future condemnation—see *United States v. Reynolds*, 397 U.S. 14, 16 (1970)), and (d) governmental actions that may be characterized as acquisitions of resources. *All* of these factors are present at bench, and findings to that effect were made by the trial court.

[3]While Appellee disputes *some* of the trial court findings of fact, and myopicly focuses, as did the State Appellate Court, upon the legitimacy of the apparent public *goal*, rather than upon the *effect* of the *improperly motivated* State *activities* (and failures to act), neither here nor below has it ever quarrelled with Findings 45-56 (Jurisdictional Statement, Appendix E, pp. A-42 - A-44). Those Findings were, moreover, made on *undisputed* trial evidence and they conclusively establish the totally confiscatory impact on the subject property.

"sticks in the bundle", leaving her nothing of utility or value, leaving her as a nominal "owner" of bare legal title (and even that subject to a pending but delayed condemnation action and a *lis pendens*), and with the subject property in a tax sale status because nothing—absolutely nothing—can be done with it.

Whether viewed as a vehicle for clarifying a badly confused area of the law, or as a means of doing justice in the face of blatant deprivation of constitutionally protected rights, Appellant respectfully suggests this case commends itself to the Court's attention and amply justifies relief.

I

APPELLEE'S NOTION OF "ADEQUATE NONFEDERAL GROUND" IS TANTAMOUNT TO AN ASSERTION THAT A STATE COURT MAY LITERALLY IGNORE THE U.S. CONSTITUTION

In the case at bench the trial court made extensive findings of federal constitutional violations. Nonetheless the Court of Appeal reversed, purporting to rely on various California statutory provisions. The opinion of the Court of Appeal is remarkable in that it *never even mentions the Constitution.*

The "nonfederal" ground on which the decision below thus rests cannot constitute a threshold disposition, does not even address the controlling federal issues, but is simply conjured out of thin air. The Court of Appeal simply ignored both the trial court findings[4] and Appellant's reli-

[4]In other words, the situation here is the same as in *Nectow v. Cambridge*, 277 U.S. 183 (1926). There the trial court found as a matter of fact that the economic viability of the property in question was destroyed. The Massachusetts appellate court

ance on the Constitution and purported to write a discourse mainly praising the public goals of State statutes governing the procedure for property acquisition and the over-regulation of coastal property planning, which thus come off as somehow so self-evidently superior to the Constitution that the latter does not even warrant a mention. That such an approach disregards the federal supremacy clause (U.S. Const., Art. VI, Cl. 2) seems evident. That the Court of Appeal decision below[5] also violates procedural due process is equally clear. The critical question here is not what the State law says, but whether what it has caused, regardless of the questionable nobility of its purposes, is repugnant to the Constitution. Or as this Court put it in *Chicago B & Q R. Co. v. Chicago*, 166 U.S. 226, 235, the duty to pay just compensation arises under the federal Constitution and cannot be evaded by reliance on state law:

> " 'Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of State legislation.' "

The same is true here.

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reversed, supposedly as a matter of law. This Court, in turn, reversed the latter decision, noting that deprivation of the owner's reasonable investment-backed expectations of some economically viable use of his land was constitutionally impermissible.

In other words, there is no state "law" that can be invoked so as to undo the constitutional guarantee against deprivation of property without due process or its taking without just compensation. The U.S. Constitution forbids it, and it—not some state law—is the supreme law of the land.

[5]Despite the Appellate Court's "one-liner" disclaiming to the contrary, the State did not challenge the substantiality of the evidence at trial, nor did the Appellate Court consider the same. To state otherwise is blatently inaccurate and an attempt to cover up what is otherwise clear on this record.

II

THE DISPOSITIVE TRIAL COURT FINDINGS ARE UNDISPUTED

While Appellee purports to quibble with some of the factual findings made by the trial court, it neither does nor can dispute Findings 45 through 56 (see Jurisd. St. at pp. A-42—A-44), as they were made on the basis of overwhelming, undisputed and unimpeached testimony of several highly knowledgeable witnesses who were unanimous in proving that *all* value, utility and saleability of the subject property were destroyed by Appellee's acts, announcements, and delays. It can no longer be the subject of rational dispute that it is such *factual* determinations, addressed to the specific facts of each individual case, that constitute the test for the presence of a *de facto* taking (*Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 123-124). Thus, those Findings of Fact that establish *without dispute* that *all* significant "sticks in the bundle" that comprise the subject property have been taken from the owner, are the core of what this case is about. Appellee's self-conscious attempt to ignore them speaks for itself.

The ultimate facts found by the trial court (and in no way disputed by the Court of Appeal) are that the subject property was stripped of *all* its value and utility, and this was done ". . . pursuant to a policy to preserve the subject property in its then undeveloped status pending its acquisition" (Finding 56, Jurisdictional Statement, Appendix E, p. A-44). Those Findings are dispositive on the taking

issue[6], because what *this* record presents is a complete and total deprivation of private property rights[7] without just compensation.

CONCLUSION

The Motion to Dismiss is a massive evasion of the Constitutional letter and policy. Appellee simply treats the present appeal as if it were a continuation of state court proceedings, rather than a review of the federal constitutional attributes of this controversy.

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[6]As this Court admonished, the presence of a taking is based on an examination of the *facts* of each case (see e.g. *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958), *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 123-124). The facts found here are that there had occurred a *complete* and *total* deprivation of *all* property rights of value or utility to the owner. *That* should be dispositive, and is in no way affected by the State's assertion that its goals were noble. This Court definitely refused to engage in any such ". . . utilitarian comparison of public benefit and private loss . . ." in *United States Trust v. New Jersey*, 431 U.S. 1, 28-29 (1977), pointedly noting that ". . . a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good . . .".

[7]Appellee asserts (Motion to Dismiss, p. 27, fn.12) that the trial court awarded just compensation for some precondemnation losses and found a constitutional taking based solely on the permit denial to Appellant. With due respect, that is simply not true; the trial court's Conclusions of Law appear as Appendix F to the Jurisdictional Statement (pp. A-45 - A-46). These Conclusions make it clear that the damages in question were awarded because the State ". . . interfered with and blocked Briggs use, development and economic return on the subject property . . ." (Id., p. A-46). In other words, this compensation was for deprivation of the right of user, not for some abstract "permit denial". Note also the State ignores several other State activities including a lawsuit commenced by the State to enjoin Mrs. Briggs' further use, development or sale of her property. Thus this is not a regulation case; nor is it the typical precondemnation activity (or "prelude") case, rather it is one in which the State engaged in several direct legal restraints pending formalization, *de jure*, of its taking for public open space and beach uses.

The entire nation suffers from a pervasive disarray and inconsistency in governing law to constitutionally protect property rights—and thus a chilling effect upon private incentive to work to acquire and hold property, while fashionable (and often lauditory) goals are zealously pursued with questionable means and unconstitutional economic effects. *That* is what this case is primarily all about. This Court's intervention and guidance are urgently needed.

Finally, even on Appellee's unsound premise, its argument fails. However sliced and tortured, *these* facts are that the subject property was *de facto* taken and stripped of *all* value and utility *in 1975*—when the inverse condemnation action accrued. To tell the owner of such land that her sole "remedy" was to sue 1½ years before her cause of action for taking even accrued (and therefore before she could make out a case) is a bizarre flouting of the Constitution and her fundamental individual rights.

Mrs. Briggs respectfully prays that the Motion to Dismiss be denied and probable jurisdiction be noted, or in the alternative that certiorari be granted.

Respectfully submitted,

JESS S. JACKSON
GIDEON KANNER
Attorneys for Appellant